Decision 03-05-016 May 8, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Authority to Lease Available Land on the El Nido-Sepulveda-Culver Transmission Right of Way to Costco Wholesale Corporation.	Application 03-02-037 (Filed February 27, 2003)

DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR A LEASE OF UTILITY PROPERTY

We grant the Application of Southern California Edison Company (SCE) for authority to lease available land under Pub. Util. Code § 851.[1] The SCE property consists of a 2.28-acre site located on a portion of SCE's El Nido-Sepulveda-Culver transmission right of way in the City of Hawthorne (Site). The Site is part of the El Nido-Sepulveda-Culver 66-kilovolt (kV) system and includes, among others, CPUC jurisdictional facilities. The lease is sought to permit Costco Wholesale Corporation (COSTCO or Lessee) to construct and operate a vehicle parking and storage lot on the Site.

Background

The Site is subject to a Lease Agreement (Lease) between SCE and COSTCO dated May 20, 2002. The Lease is intended to replace a license agreement between the parties dated August 30, 2000 (License). Under the

[1] All statutory references are to the Public Utilities Code unless noted otherwise.

License, SCE receives an annual fee of $25,211. Under the terms of the Lease, this fee will be replaced by an annual base rent ranging from $99,232 to $132,077. Pursuant to the Lease, COSTCO will lease the Site from SCE for use as a vehicle parking lot for a period of 20 years, with three additional ten-year renewal terms. The annual base rent rises throughout the term of the lease at five-year intervals, as follows:

Years 1 through 5	$ 99,232
Years 6 through 10	$109,155
Years 11 through 15	$120,070
Years 16 through 20	$132,077

The three ten-year renewal options are at fair rental value.

The Lease provides that COSTCO's activities must not interfere with the operation of the electric facilities that cross the Site. To that end, COSTCO is forbidden to use or store hazardous substances, explosives or flammable materials on the Site. Further, any equipment used by COSTCO on or adjacent to the Site must maintain at all times a clearance of at least eighteen (18) feet from all overhead electrical conductors. COSTCO must maintain a minimum radius of fifty (50) feet around all tower legs and ten (10) feet around all poles and anchors and provide access roads to the Site that are at least sixteen (16) feet wide and capable of supporting a gross load of forty (40) tons on a three-axle vehicle.

SCE retains various rights under the Lease including the rights to

- Enter the Site at any and all reasonable times to inspect the property;
- Impose temporary restrictions on COSTCO's right to enter, occupy, and use the Site in order to perform necessary work on the electrical facilities located on the Site; and

- Take back all or part of the leasehold by eminent domain or inverse condemnation.

COSTCO is also required to

- Pay all personal property taxes, general or special assessments, or other fees levied against the Site or the improvements to be constructed thereon;
- Obtain all permits and approvals for construction and any zoning changes or use permits required for operation of its business on the Site;
- Maintain appropriate comprehensive general liability, auto liability, and worker's compensation insurance; and
- Indemnify SCE against all liability for damages or injury to persons on the Site except to the extent caused by SCE's negligent or willful misconduct.

The Application

On February 27, 2003, SCE filed its application, seeking authorization from the Commission to enter into the lease with COSTCO. SCE's application is made under § 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public.[2] Leasing

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[2] Section 851 reads:

> No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition,

Footnote continued on next page

real property on which transmission towers and lines are located is therefore one of the enumerated activities that require approval under § 851.[3]

Determination of Best Secondary Use

The primary use of facilities located on the Site is the transmission and distribution of electricity in the City of Hawthorne. SCE's aboveground electric lines crossing the Site, and their associated restrictions and height clearances limit the potential secondary uses. SCE states that its objective has been to select secondary uses for its property that provide the highest revenue consistent with its utility safety and reliability obligations, and that it has determined that the COSTCO project offers the highest potential revenue. Pursuant to the License, the Site is currently used as a vehicle parking lot that serves customers of an

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encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture. Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

[3] As the Commission previously stated: "The language of Section 851 is expansive, and we conclude that it makes sense to read "encumber" in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility's plant, system, or property." (Decision (D.) 92-07-007, 45 CPUC 2d 24, 29.)

adjacent COSTCO wholesale warehouse. To evaluate the rental potential of the Site, SCE analyzed the rent paid for comparable parking facilities in and around the Site. SCE believes that the rent it will receive offers the highest level of potential revenue, falls within the acceptable market range, and is in line with revenues it receives from similar Commission-approved transactions.

Developer Selection

SCE states that it entered into the Agreement with COSTCO because of the economic benefits to SCE ratepayers. SCE chose COSTCO as its developer because of COSTCO's offer to lease the site, its financial strength and stability, and the consistency of the use with the plans of the Hawthorne Community Redevelopment Agency for development of the Hawthorn Gateway Center Project. The Hawthorne Center Gateway Project is a 44-acre development involving construction of retail, auto sales and service, and hotel facilities that includes the Site. COSTCO is one of the largest membership chain retailers in the world, with annual revenues in excess of $34 billion.

Environmental Review

Because California Environmental Quality Act (CEQA) applies to discretionary projects to be carried out or approved by public agencies and because the Commission must act on the § 851 application and issue a discretionary decision without which the project cannot proceed, the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA guidelines Section 15051(b)).

In this case, the City of Hawthorn is the Lead Agency. The California Public Utilities Commission (CPUC) is a Responsible Agency for this proposed project. CEQA requires that the CPUC consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the

Commission must consider the Lead Agency's environmental documents and findings before acting upon or approving the project. (CEQA guidelines Section 15050(b).) The specific activities that must be conducted by a Responsible Agency are contained in CEQA guidelines Section 15096.

In particular, in August 1999, the City issued a Final Environmental Impact Report (FEIR) for the Hawthorne Gateway Center Project (SCH 99041048) which includes environmental review of the project activities under this application. The larger Hawthorne Gateway Center Project involves the development of retail, auto sales and service, and hotel uses on a 44-acre site. On September 13, 1999, the City Community Redevelopment Agency adopted Resolution No. 343 certifying the FEIR, adopting a Mitigation and Monitoring Program for the project, and adopting a Statement of Overriding Considerations (SOC) for potentially significant but unavoidable environmental impacts resulting from the project. The City filed its Notice of Determination (NOD) in compliance with Public Resources Code Sections 21108 and 21152, approving the project on September 14, 1999.

The City found that the Hawthorne Gateway Center Project would have no potential significant environmental impacts in the areas of geology, water, biological resources, land use, energy and mineral resources, cultural resources, archeological and historic resources, recreation, population, and housing. The City found that the project would result in potentially significant environmental impacts related to noise, air quality, traffic and circulation, and aesthetics. The City adopted a Mitigation and Monitoring Program to either eliminate or reduce each of these specific potentially significant impacts to less than significant levels. The City found that the project would result in potentially significant but unavoidable impacts in the areas of public services related to fire and police protection, air quality, traffic and circulation, and solid waste disposal. With respect to those impacts the City adopted an SOC which found that physical, social and economic benefits of the project outweighed the unavoidable impacts and justified adoption of the project.

With respect to the potentially significant environmental impacts involving noise, air quality, traffic and circulation, and aesthetics, we find that the City adopted reasonable and feasible mitigation measures to either eliminate or reduce the impacts to less than significant levels. We also find that with respect to the above-identified unavoidable significant impacts, the City identified project benefits which would justify approval of the project. Accordingly, we adopt the City's findings, requirements under the Mitigation and Monitoring Plan, and SOC for purposes of our approval.

Revenue Treatment

All revenues from the proposed lease will be treated as Other Operating Revenue (OOR). In D.99-09-070, the Commission adopted a gross revenue sharing mechanism for certain of SCE's operating revenues. The sharing mechanism applies to OOR, except for revenues that (1) derive from tariffs, fee or charges established by the Commission or by the Federal Energy Regulatory Commission; (2) are subject to other established ratemaking procedures or mechanisms; or (3) are subject to the Demand-Side Management Balancing Account.

Under the sharing mechanism, applicable gross revenues recorded from non-tariffed products and services like the proposed lease are to be split between shareholders and ratepayers after the Commission-adopted annual threshold level of OOR has been met. For those non-tariffed products and services deemed "passive" by the Commission, the revenues in excess of the annual threshold are split between shareholders and ratepayers on a 70/30 basis. The Lease and the proposed lease are "passive " for sharing purposes.[4]

Discussion

As a lease of utility-owned real property, the proposed transaction falls squarely within the requirements of § 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public. The basic task of the Commission in a § 851 proceeding is to determine whether the transaction serves the public interest: "The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers." (D.02-01-058 (2002).) We have reviewed the proposed agreement and find it does not interfere with SCE's operation or affect its ability to provide service to its customers. In other contexts, we have defined "productive" activities as those that lead to a measurable benefit to ratepayers. Because ratepayers will receive 30% of the gross revenue from the transaction without incurring any measurable increased costs, we find that the property is being "used for other productive purposes" and accordingly the proposed Lease is in the public interest and the Application should be approved.

[4] *See* Attachment B to SCE's Advice Letter 1286-E, which identifies the *Secondary Use of Transmission Right of Ways and Land* and the *Secondary Use of Distribution Right of Ways, Facilities and Substations* as categories of non-tariffed products and services. Advice Letter 1286-E was filed on January 30, 1998, pursuant to Rule VII.F of the Affiliate Transaction Rules contained in Appendix A of D.97-12-088.

Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Karl J. Bemesderfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. In order for COSTCO to operate a vehicle parking lot on the Site, a lease from SCE is required.
2. Lease of the Site to COSTCO is consistent with the current uses of the related SCE properties.
3. The Lease will not impair SCE's ability to provide service to the public.
4. The City is the lead agency for environmental review under CEQA.
5. The Commission is a responsible agency for environmental review under CEQA.
6. The Commission has reviewed the City's FEIR for the Hawthorne Gateway Center Project, its adopted Mitigation and Monitoring Program, its Resolution certifying the FEIR and SOC, and NOD, and finds these documents adequate for our decision-making purposes.
7. The project activities, which are the subject of this application, received environmental review as part of the Hawthorne Gateway Center Project.
8. All revenue from the Lease in excess of a Commission-established threshold will be treated as OOR and shared 70/30 between SCE and its ratepayers, pursuant to D.99-09-070.
9. There is no known opposition to granting the authorization requested.

Conclusions of Law

1. Approving the requested Lease is in the public interest.

2. With respect to the potentially significant environmental impacts resulting from the project, we find that the City adopted reasonable and feasible mitigation measures to either eliminate or reduce the impacts to less than significant levels. We adopt the City's findings and required Mitigation and Monitoring Program for purposes of our approval.

3. With respect to the significant but unavoidable environmental impacts resulting from the project, we find that the City identified project benefits to justify approval of the project. Accordingly we adopt the City's SOC for purposes of our approval.

4. This decision should be effective today in order to allow COSTCO to expeditiously enter into the Lease with SCE.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company's Application for authority to lease a portion of its El Nido-Sepulveda-Culver Transmission Right of Way to Costco Wholesale Corporation is granted, as described above.

2. We adopt the City's environmental findings, required Mitigation and Monitoring Program, and Statement of Overriding Considerations.

3. This proceeding is closed.

This order is effective today.

Dated May 8, 2003, at San Francisco, California.

MICHAEL R. PEEVEY

President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners